BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ABEL HERNANDEZ Claimant VS. **SEABOARD FARMS** Respondent AND **FIDELITY & GUARANTY INS. CO.** Insurance Carrier	)	Docket No. 1,055,015

ORDER

STATEMENT OF THE CASE

Claimant requests review of the May 8, 2012, preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller. Deborah K. Mitchell, of Wichita, Kansas, appeared for claimant. John David Jurcyk, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to prove he met with personal injury by accident that arose out of and in the course of his employment with respondent. Accordingly, claimant's request for the payment of medical bills was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 7, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends the ALJ erred in finding that he did not suffer personal injury by accident arising out of and in the course of his employment.

Respondent argues that the only possible basis for a finding in claimant's favor on the issue of causation is the doctor's statement that claimant had been hit in the face with high pressure water and later developed a detached retina. Respondent maintains

claimant's position amounts to *post hoc, ergo propter hoc* logic and that there is no competent evidence of causation.

The issue for the Board's review is: Did claimant suffer personal injury by accident that arose out of and in the course of his employment?

FINDINGS OF FACT

On the evening of Tuesday, February 22, 2011, claimant was working at respondent's facility helping to load hogs into a semitrailer when he was hit on the back of his legs by some pigs. Claimant was using a board to sort the pigs. When he was hit from behind by the pigs, the board he was holding struck either one water spigot or two water spigots, which were supplied with water with hoses and from which the pigs drank. When the spigot(s) were hit, they sprayed water in claimant's face and eyes. Claimant testified the water pressure was strong enough to cause his eyes to become bloodshot.

Claimant reported his injury immediately to his crew leader, David Ramos. Mr. Ramos had claimant fill out a report of the accident. Claimant called his lead supervisor, Anthony Cardova, about an hour after the accident and was told to wash out his eyes with a water solution respondent kept in a first aid kit. Mr. Cardova thought claimant may have gotten some dirt in his eye.

Claimant was wearing glasses at the preliminary hearing but was not wearing them at the time of the accident. He testified that respondent had safety glasses but their use was not mandatory, and he was not wearing safety glasses at the time of the accident.

On February 23, 2011, claimant noticed a problem with the vision in his left eye. He testified it seemed like a cloud came down over his left eye. Claimant thought he might have gotten some dirt in his eye and continued to wash his eye out with the water solution.

On February 24, 2011, claimant saw Dr. Robert Hoch, his optometrist. Claimant reported to Dr. Hoch that he got water in his eye and thought there might have been chemicals in the water. It was later determined by respondent that the water contained no chemicals. Dr. Hoch examined claimant's left eye and told him he needed surgery right away. Dr. Hoch's diagnostic impression was left inferior retinal detachment.

Dr. Hoch immediately referred claimant to Dr. Kumar Dalla, an ophthalmologist. Dr. Dalla was given a history that claimant was at work and was hit in his left eye with pressured water. Dr. Dalla performed surgery on claimant's left eye on February 28, 2011. The procedure consisted of a repair of the left macula-off retinal detachment.

On January 24, 2012, claimant was seen at his attorney's request by Dr. Dasa Gangadhar. Claimant was complaining of blurry vision in his left eye with an onset one year before. Claimant gave a history of being "hit in the face with high pressure water on

2/22/2011."[1] Dr. Gangadhar diagnosed left retinal detachment and status post retinal repair by Dr. Dalla. Dr. Gangadhar noted VF deficit and positive ADP which will limit claimant's vision.

Respondent offered as exhibits photographs of the spigots used to provide water to the pigs and also photographs depicting a gauge that measured the water pressure in the so-called stationary drinker at approximately 35 pounds per square inch. Claimant testified that at times the water from the spigots would just be dripping and other times the water would shoot out a little faster. Claimant admitted he did not know whether the water was running fast or slow on the day the water splashed in his face, and he did not know what the water pressure was. However, claimant stated the water pressure was high enough to make his eyes bloodshot following the accident.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee sustains personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts of the particular claim.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection

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[1] P.H. Trans., Cl. Ex. 1 at 1.

[2] K.S.A. 2010 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

The undersigned Board member finds that the ALJ's preliminary hearing Order should be affirmed.

There is no medical opinion in this record which supports the notion that claimant's detached left retina was caused by the accident he described. There was no dispute that claimant hit a spigot or spigots with a board he was using to sort pigs and that he was sprayed in the face with water. But none of the physicians whose records were admitted into evidence express an opinion which supports claimant's allegation that the retina injury was caused, contributed to, or aggravated by the accident.

Although medical evidence is not essential or necessary to establish the existence of a worker's injury, and a claimant's testimony alone may be sufficient evidence,[7] a preponderance of the credible evidence must support the finding that claimant's accidental injury arose out of and in the course of claimant's employment. Such evidence is lacking, and the ALJ correctly found claimant did not sustain his burden in that regard.

Claimant's testimony and the histories he gave to the various heath care providers are consistent regarding the incident involving the spraying water. But the injury is not consistent with the photographic evidence admitted at the preliminary hearing. The

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[4] *Id.* at 278.

[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2011 Supp. 44-555c(k).

[7] *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999); *Hanson v. Logan U.S.D. 326,* 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

photographs show that the stationary drinker is a structure in a barn-like building, consisting of a vertical pipe through which water flows to allow the pigs to drink. The lower portion of the pipe "forks" into two downward facing pipes or hoses. On the end of each pipe/hose is a metal spigot from which the pigs drink. Each spigot has a stem inside its end which can be turned upward or downward. Whether the stem is pushed up or down, the result appears to be the same–water either leaks or lightly sprays out.

The photographs do not reveal how claimant could have been sprayed forcefully in the face with water under high pressure. Claimant did not know the amount of pressure at which the water was flowing when the alleged injury occurred. Although some of the photographs admitted into evidence show the water flowing to the so-called stationary drinker at about 35 pounds per square inch, those pictures were taken on March 15, 2011, some three weeks after the accident. Nobody testified what the water pressure was on February 22, 2011.

Claimant provides little in the way of detail regarding precisely what happened in his accident. He testified at one point that the board he was using struck two spigots. Later in his testimony he said the board hit only one spigot. He testified that the board hit the metal spigots themselves and he also testified that the board hit the pipes or hoses through which the water flowed into the spigots or "nipples." Claimant did not say whether the spigot was knocked completely or partially off or that the pipe or hose was damaged or split open. Nor does the record establish what amount of force was needed to cause a retinal detachment. It is difficult to envision how an accident such as claimant described could have caused high pressure water to shoot with enough force to cause a retina to detach. Claimant testified that the board he was using knocked the spigots downward, which was the direction they were already facing. Claimant testified that the pictures of the stationary drinker were an accurate depiction of the drinker in operation.[8] Those pictures show water coming out of the spigots at a relatively low pressure, as one would expect from a device intended to allow the pigs to drink.

CONCLUSION

Claimant did not sustain his burden to prove that his alleged accidental arose out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated May 8, 2012, is hereby affirmed.

IT IS SO ORDERED.

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[8] P.H. Trans., Resp. Ex. 1 at 1-6.

Dated this _____ day of September, 2012.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

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Pamela K. Fuller, Administrative Law Judge